

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

July 18, 2007

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing
Date of Filing: January 19, 2007
Case Number: TSO-0463

This Decision concerns the eligibility of XXXXXXXXXXXX (hereinafter "the Individual") for access authorization. The regulations governing the Individual's eligibility are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the Individual is eligible for access authorization. For the reasons detailed below, the Individual is not eligible at this time.

I. BACKGROUND

The Individual has worked for a DOE contractor and held a clearance for over thirty years. DOE Ex. 17 at 2. The security concerns relate to alcohol consumption and the accuracy of the Individual's report of an arrest for Driving Under the Influence (DUI) of alcohol.

In December 2003, the Individual was arrested on a Friday evening and charged with DUI based on a Blood Alcohol Content (BAC) of .082 percent. In March 2004, the local security office (LSO) interviewed the Individual. DOE Ex. 4 (the March 2004 personnel security interview or March 2004 PSI).

During the March 2004 PSI, the Individual discussed the incident. She stated that it was a rainy night and she was behind a slow-moving van in a no-passing zone. DOE Ex. 4 at 6. She stated that she became "frustrated" and passed the van. *Id.* She then saw a police car; it did not signal her to pull over but she did so because she knew that she had "broken the law." *Id.* When the

officer asked the Individual if she had had anything to drink, she told the officer that she was not drunk; she reported having had cold medicine throughout the day and one alcoholic drink that evening. *Id.* at 7. The officer asked her to perform a sobriety test, and she was "wobbly" because of the "uneven" ground. *Id.* at 8.

When the personnel security specialist asked for confirmation that the Individual had had only one alcoholic drink, the Individual stated "[a]s far as I remember. It's been awhile now. ... I might be wrong on that but as far as I am aware." DOE Ex. 4 at 9. The Individual reported that the charges had been dropped, *id.* at 12, and provided a letter from the local district attorney's office, DOE Ex. 14.

When asked about her pattern of alcohol consumption, the Individual indicated that she would have a glass or two of wine when she went out for dinner. DOE Ex. 4 at 24-25. The personnel security specialist asked, "You never drink at home?" and the Individual responded, "I don't say never. Um, there are times that, if I've had a couple of drinks out and I want to, to, uh, continue to get intoxicated, I will do that at home. Uh, I'm a private person and I don't like people listening to me when I'm not in control." *Id.* at 25. She estimated that she got intoxicated "one or two times a year." *Id.* at 26. When asked how much it took to get her intoxicated, she estimated two to three drinks, and then stated that the last time she had been intoxicated was a few years ago. *Id.* at 29-31.

The LSO referred the Individual to a DOE consulting psychiatrist, who issued a report. DOE Ex. 15. The psychiatrist did not diagnose the Individual with an alcohol-related condition nor did he conclude that she used alcohol habitually to excess. As a result, the Individual maintained her clearance.

In February 2006, the Individual was injured in an automobile accident and arrested a second time for DUI, based on BAC readings of 0.12 and 0.13. DOE Ex. 9. In July 2006, the LSO interviewed the Individual. DOE Ex. 3 (the July 2006 personnel security interview or July 2006 PSI).

During the July 2006 PSI, the Individual discussed the 2003 and 2006 arrests. She stated that the 2003 charges were dismissed because her BAC was less than the .082 listed in arrest documents. DOE Ex. 3 at 26; see also May 24, 2004 District Attorney's Statement. For the 2006 arrest, she described the day of the

arrest. She went to a sales party and had two glasses of wine "around noon." *Id.* at 30-31, 41. At around 5:00 P.M., she and another friend went to a restaurant and had appetizers and a cocktail. *Id.* at 31, 41. She then went somewhere else, saw a gentleman that she was seeing with another woman, and was driving home "teary-eyed" on a "dark, country road" when her car went off the embankment. *Id.* at 32. She stated that the police officer "claimed he gave me all these [field sobriety] tests, he did not." *Id.* at 42-43. She stated that she was transported to the hospital, but did not receive proper treatment for her injuries, which involved her head, hand, and tongue. *Id.* at 44. She stated that she requested a blood test but that the doctor "couldn't get a vein," so she had a Breathalyzer test on a machine "they were having problems with." *Id.* at 44-45, 47.

On the issue of her pattern of alcohol consumption, the Individual referred to a neighbor's DUI arrests and stated, "I don't drive much anyway, but, like I said, I drink at home now," and "if I'm drinking by myself I'm not going to drink as much anyway." *Tr.* at 52-53. When asked if she was currently consuming alcoholic beverages, she said, "Yeah. But not often anymore." *Id.* at 53. She stated that in her lifetime she has been intoxicated "maybe five times." *Id.* at 61. When asked how much it took for her to become intoxicated on those occasions, she stated:

Let's see here. What did we drink? One time I was at a friend's house. We drank, um several beers, while doing shots of brandy and we went through a bottle of brandy. It takes quite a bit of alcohol to get me drunk. What else did we have? I know we had a lot of stuff to drink that night. We were doin [sic] - it was one of those, I says, okay, you talk a mean game, you say you can out drink me, let's see. So obviously I'm not going anywhere if I'm going to drink to my full capacity.

Id. at 63. She indicated that the foregoing occurred in the 1970s and that as she has gotten older, she can tolerate less and wants less. *Id.* at 65. She stated that the last time she was intoxicated was that past Christmas, i.e., Christmas 2006. *Id.* at 67. When asked how much it alcohol it would take for her to become intoxicated, the Individual stated that "it still would take a high amount" and estimated a bottle of tequila, depending on the size of the bottle. *Id.* at 70. The Individual stated that she did not believe that she had ever had an alcohol problem and stated "I have stopped for as much as five years at a time." *Id.* at 71. When asked how much alcohol she had consumed at Christmas, she stated

"two shots of tequila" and "other alcohol." *Id.* at 72. When asked about her future intentions regarding the excessive use of alcohol, the Individual stated that she had "been cutting back" and that "chances" were that she would not drink to excess but if she did it would be at home. *Id.* at 79-80.

In November 2006, the LSO issued a Notification Letter, which cited two security concerns. DOE Ex. 1. The first concern was that the Individual has "been, or is, a user of alcohol habitually to excess." 10 C.F.R. § 710.8(j) (Criterion J). The Notification Letter cited the two DUI arrests. DOE Ex. 1. The second security concern was that the Individual was not honest, reliable, and trustworthy. 10 C.F.R. § 710.8(l) (Criterion L). The Notification Letter cited the Individual's statement at the July 2006 PSI that she was not given field sobriety tests and the police report statement to the contrary. DOE Ex. 1.

The Individual responded to the Notification Letter and requested a hearing. I was appointed to serve as the hearing officer. I held a pre-hearing conference and convened the hearing. At the hearing, DOE Counsel did not present any witnesses. The Individual testified and presented five witnesses: three friends, one co-worker/friend, and her supervisor.

After the hearing, the Individual submitted a copy of a transcript of a preliminary hearing on the February 2006 DUI, which confirmed that she had requested a blood test but that the technician maintained that he was unable to find a vein. The Individual also submitted an affidavit that stated she did not recall whether, at the time of the February 2006 DUI, she was given field sobriety tests. Finally, she submitted blood test results that showed normal liver enzymes.

II. THE HEARING

A. The Individual

The Individual testified that she was not intoxicated at the time of the December 2003 arrest. She testified that she had one alcoholic drink and cough medicine that contained alcohol. *Tr.* at 78.

The Individual testified that she was also not intoxicated at the time of the February 2006 arrest. Initially, she testified that she had had one alcoholic drink. *Tr.* at 81. When asked to explain her PSI statement that she had had two glasses of wine around noon at a sales party and then a drink later in the day, she stated: "I

didn't have a couple glasses around noon, because I didn't get there until afternoon, because I don't come to [the town] before noon on the weekends." *Id.* at 81. She further testified: "So if I said noon, I might have meant 2:00 *Id.* at 82. When asked for her recollection of the afternoon, she testified:

Well, like I said, at the [sales] party, when it was kind of winding down, we were sitting outside. At the first part of the [sales] party, because money is involved, that's another reason not to drink, and I was drinking water.

Now, later in the day, like I said, at the [sales] party, when we're all sitting out there, that's when they started drinking, and I invited [Friend 3] to go to dinner with me.

We had a couple of appetizers and a cocktail, and she went her way.

Id. at 84. At a later point in the hearing, the Individual stated that she had one alcoholic drink at the party and another with Friend 3. When asked how many drinks she had had that day, she testified: "As far as I can recall, two - two cocktails, and it was at least an hour in between them, and a lot of water and food." *Id.* at 107.

When asked how the accident occurred, the Individual testified that after having a cocktail with Friend 3,

I went to another place and observed something that was painful

I left pretty much instantly and didn't think I was upset as I was, until I got further down the road and realized I was crying, and other things, and then I was angry with myself for being upset and embarrassed.

I hit a curve wrong. Instead of going - I went off a cliff, I hit a curve, and by the grace of God, I'm still here. Instead of turning right, I went left and just went completely off the cliff and wedged my car in.

Tr. at 85. She testified that she was hurt: "[M]y finger is still bent after a year or so. It was messed up. I had contusions on my head, because my head hit the dashboard, or whatever, and I was bleeding." *Id.* at 87.

The Individual testified that she was taken to the hospital and told she was under arrest. Tr. at 87. She stated that she asked for a blood test, but that the technician claimed that he could not find a vein. Id. at 87. She testified that she was then taken to jail and was given a Breathalyzer test. Id. at 88. She testified that she believes that the case is going to be dismissed. Id.

DOE Counsel referred to the July 2006 PSI in which the Individual denied being given field sobriety tests. She testified that she did not recall the officer giving her field sobriety tests. Tr. at 86. She later testified, "I said what I thought was true at the time [of the PSI]; I would never purposely mislead [the security specialist]." Id. at 100.

When asked about the last time she was intoxicated, the Individual testified, "I have not been intoxicated in '06, '07, '05" Tr. at 114. When asked when she was last intoxicated, the Individual stated "It was Christmas Eve, I was by myself at home, I'm thinking it was probably on '04, by myself." Id. at 114. "It might have been - it might have been '05, but I think it was '04." Id. She added, "I wasn't totally intoxicated then, but yes, I'd have more to drink than I would around somebody." Id. at 115.

B. The Individual's Friends and Colleagues

1. Friend 1

Friend 1 testified that she has known the Individual for about two years. Tr. at 8. Friend 1 met the Individual socially, but they also work for the same employer and see each other sometimes at work. Id. at 7-8, 10.

Friend 1 has seen the Individual at parties four or five times during the last two years and does not believe that the Individual has had more than a glass of wine on those occasions. Tr. at 9-10. Friend 1 has never seen the Individual intoxicated. Id. at 9. Friend 1 has never heard others express concern that the Individual drinks too much. Id. at 10.

On the issue of honesty, Friend 1 testified that "it would surprise" her if the Individual would say something that was not correct. Tr. at 12. The Individual has a reputation at work for being truthful, and no concerns have been expressed about her drinking habits. Id. at 14. The Individual does not talk about work in social settings. Id. at 16.

2. Friend 2

Friend 2 has known the Individual for over 20 years. Tr. at 31. Friend 2 and the Individual have socialized for about ten years and play on the same soccer team. Id. at 32, 39. The Individual has socialized at Friend 2's house and has played with Friend 2's children. Id. at 32-33, 43.

Friend 2 has seen the Individual drink but no more than three drinks at a time. Tr. at 32. Friend 2 has never seen the Individual intoxicated. Id. Usually, the Individual has a "couple of beers" and "usually drinks water with them." Id. at 35. The Individual spent the last New Year's Eve at the house of Friend 2, had snacks with her children, and "maybe a beer." Id. at 41-42.

Friend 2 believes that the Individual is honest: the Individual is "open" with things that happen and has "never lied" to Friend 2. Tr. at 36-37. Friend 2 does not believe the Individual would lie to anybody else. Id. at 37. The Individual has not talked about work-related issues with Friend 2. Id. at 40.

3. Friend 3

Friend 3 has known the Individual for about two to three years. Tr. at 58. They are part of a group of individuals who eat out together once a week. Id. at 69. They also go to private homes to watch televised sports events. Id. at 64-65.

Friend 3 has seen the Individual drink alcoholic beverages. Tr. at 60. Friend 3 does not keep track of what other people drink but estimates that the Individual probably consumes "two or three drinks" at social events at the friend's home. Id. Friend 3 has a lot of parties and social events and has seen the Individual in about 20 to 30 situations in which alcoholic beverages are served. Id. at 63. Friend 3 has seen the Individual intoxicated "maybe once" and, on that occasion, the Individual stayed over at her house. Id. at 65.

Friend 3 did not recall whether she saw the Individual the day of the accident, but testified that the Individual stayed with her the night of the accident. Tr. at 66, 69. Friend 3 stated that the Individual was in "pretty bad shape" and cited blood on the Individual's shirt and an injured finger. Id. at 66-67. Friend 3 did not detect the odor of alcohol. Id. at 67. Friend 3 was concerned "with [the Individual] physically, because she looked hurt" and "mostly wanted to get home." Id. at 68.

Friend 3 has never been in situations where she would suspect the Individual's honesty. Tr. at 62. Friend 3 trusts the Individual not to repeat something said in confidence, and the Individual does not talk about work with Friend 3. Id. at 62-63.

4. Co-worker and social friend

The co-worker/friend has known the Individual "since probably the end of 2004." Tr. at 47. They socialize at home sales parties "maybe three or four times" a year. Id. The Individual has a glass or two of wine and does not get intoxicated. Id. at 48. In addition to the home sales parties, the Individual helps the co-worker/friend on charitable fund-raisers; on those occasions no alcohol is served. Id. at 51-54. The co-worker/friend has never been in the Individual's home. Id. at 53.

The co-worker/friend does not believe that the Individual would lie. Tr. at 50. The Individual has never discussed work-related matters. Id.

C. The Individual's Supervisor

The Individual's supervisor testified that he has known the Individual for over 30 years and has been her supervisor off and on for about 10 to 15 years. Tr. at 21. The supervisor has not seen the Individual drink and has not seen any evidence of an alcohol problem. Id. at 22-23. The supervisor was "very" surprised when he learned of the administrative review proceeding. Id. at 23. The Individual's supervisor has "found her to be truthful and above board." Tr. at 23. The supervisor thinks that there have been times when the Individual could have misstated things to avoid responsibility for a mistake but did not do so. Id. at 24. The Individual has always "owned up to" weaknesses in performance. Id. at 25.

III. APPLICABLE STANDARD

Under Part 710, certain types of information raise a concern about whether an individual is eligible for access authorization. Derogatory information includes, but is not limited to, the information specified in the regulations. 10 C.F.R. § 710.8. Once a security concern is raised, the individual has the burden to bring forward sufficient evidence to resolve the concern.

In considering whether an individual has resolved a security

concern, the hearing officer considers various factors, including the nature of the conduct at issue, the frequency or recency of the conduct, the absence or presence of reformation or rehabilitation, and the impact of the foregoing on the relevant security concerns. *Id.* § 710.7(c). The decision concerning eligibility is a comprehensive, common-sense judgment based on a consideration of all relevant information, favorable and unfavorable. *Id.* § 710.7(a). In order to reach a favorable decision, the hearing officer must find that "the grant or restoration of access authorization to the individual would not endanger the common defense and security and would be clearly consistent with the national interest." *Id.* § 710.27(a).

IV. ANALYSIS

A. Criterion J Concern - Use of Alcohol Habitually to Excess

Under the DOE regulations, information that an individual has "been, or is, a user of alcohol habitually to excess" is a security concern. 10 C.F.R. § 710.8(j). Because the regulations do not specify what constitutes use of alcohol "habitually to excess," I look to the adjudicative guidelines. See Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information issued on December 29, 2005 by the Assistant to the President for National Security Affairs, The White House (the Adjudicative Guidelines). Guideline G concerns alcohol consumption and cites, as a security concern, the "habitual or binge consumption of alcohol to the point of impaired judgment." Guideline G, ¶ 22(c). Accordingly, the use of alcohol "to the point of impairment" is the use of alcohol "to excess."

The Individual's two DUI arrests raise a security concern that she has been a user of alcohol habitually to excess. The arrests occurred in late 2003 and early 2006 - just a little over two years apart. The first DUI arrest was associated with a traffic violation and the second with an accident caused by the Individual. These circumstances are sufficient to raise a concern that the Individual has been a user of alcohol habitually to "excess" or to "the point of impaired judgment." See 10 C.F.R. § 710.8(j); Guideline G, ¶ 22(c).

The Individual has not brought forward sufficient evidence and testimony to resolve the concern. As explained below, based on my consideration of the entire record, I am not persuaded that the Individual was not intoxicated or impaired at the time of the DUI arrests, and I am also not persuaded that they were isolated incidents.

The record indicates that, at the time of the December 2003 DUI arrest, the Individual had alcohol in her blood and committed a moving violation - an indication of impaired judgment. Furthermore, I am skeptical of the Individual's position that she had only one alcoholic drink. In the March 2004 PSI, the Individual stated that she told the officer that she had had one drink. When the security specialist asked her if she had had only one drink, the Individual stated, "As far as I'm aware. It's been a while now. ... I might be wrong on that but as far as I'm aware." DOE Ex. 4 at 8-9. I find it hard to believe that the Individual would not remember the amount of alcohol consumed on the day of a DUI arrest that occurred five months earlier, particularly when the Individual maintains that she was not intoxicated.

The record also indicates that, at the time of the February 2006 DUI arrest, the Individual had alcohol in her blood and committed a driving error that caused an accident - an indication of impaired judgment. Again, I am skeptical of the Individual's description of her alcohol consumption. She told the security specialist that she had had three drinks. DOE Ex. 3 at 30-31, 41. In the early portion of the hearing, she stated that she had had one drink. Tr. at 81. Toward the end of the hearing she stated that she had had two drinks. *Id.* at 107. Again, I find it hard to believe that the Individual would not remember precisely the amount of alcohol consumed on the day of a recent DUI arrest.

In addition to the Individual's lack of clarity concerning the amount of her alcohol consumption on the days of the two DUIs, none of her witnesses testified to her consumption on those days. Accordingly, the only evidence supporting the Individual's version of events is her own conflicting testimony.

Finally, I am not persuaded that the DUIs were isolated instances of excessive drinking. First, it is improbable. Second, while I believe that the Individual's witnesses testified honestly and candidly, they were not able to testify concerning the Individual's alcohol consumption at the time of the DUIs and, therefore, may be unaware of other instances of alcohol use, including those when the Individual is home alone. Third, the Individual's conflicting testimony concerning her alcohol consumption makes me unwilling to give much weight to her testimony.

Based on the foregoing, I find that the Individual has not resolved the concern that she has been a user of alcohol habitually to excess. Furthermore, as explained below, the Individual has not demonstrated adequate evidence of reformation or rehabilitation.

The DOE regulations do not specify what constitutes adequate evidence of reformation or rehabilitation. Accordingly, I again look to the adjudicative guidelines. Guideline G gives examples of adequate evidence of reformation or rehabilitation from an alcohol-related problem. At a minimum, the Individual would have to establish a "pattern of abstinence or responsible use." Guideline G, ¶ 23(b).

The Individual has not demonstrated a pattern of abstinence or responsible use. Although the Individual denies that she consumes alcohol habitually to excess, her description of her alcohol consumption lacks clarity and shows little insight. Accordingly, I am unable to find that she has established a "pattern of responsible use." See Guideline G, ¶ 23(b).

B. Criterion L Concern - Honesty, Reliability, and Trustworthiness

Under the DOE regulations, information that an individual is not "honest, reliable, or trustworthy" raises a security concern. 10 C.F.R. § 710.8(1). It is undisputed that, during the July 2006 PSI, the Individual maintained that she was not given field sobriety tests in conjunction with her February 2006 DUI arrest, even though the police report stated she was given such tests. This inconsistency raises a security concern under Criterion L that the Individual is not honest, reliable, and trustworthy.

The Individual has not brought sufficient evidence to resolve the concern. At the hearing, the Individual testified that she did not recall any such tests. Although I recognize that a lack of recall could be attributable to physical trauma associated with the accident, such a lack of recall could also be attributable to intoxication or a combination of physical trauma and intoxication. Overall, the inconsistent or unclear statements concerning the arrests leave unresolved the concern that she was impaired or was not giving an accurate version of events. Accordingly, I find that the Individual has not resolved the concern that she is not honest, reliable, or trustworthy.

V. CONCLUSION

The Individual has not resolved the Criteria J and L concerns. For that reason, I cannot conclude that restoration of the Individual's access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). Accordingly, the Individual's access authorization should not be restored at this time. Any

party may seek review of this Decision by an Appeal Panel under the procedures set forth at 10 C.F.R. § 710.28.

Janet N. Freimuth
Hearing Officer
Office of Hearings and Appeals

Date: July 18, 2007